BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU To Modify SUP No. 2008/SUP-2 by Modifying the State Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, Dated October 22, 2009	FILE NO. 2008/SUP-2 LUC DOCKET NO. SP09-403 INTERVENOR SCHNITZER STEEL HAWAII CORP.'S **MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY AND MAILE SHIMABUKURO'S MOTION TO DISMISS FILED NOVEMBER 7, 2011**; CERTIFICATE OF SERVICE

INTERVENOR SCHNITZER STEEL HAWAII CORP.'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO DISMISS FILED NOVEMBER 7, 2011

I. INTRODUCTION

Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer") opposes Intervenors Ko Olina Community Association and Maile Shimabukuro's (collectively, "KOCA") Motion to Dismiss because it is based on an erroneous reading of Hawaii statutes and regulations. A comprehensive reading of the statutes and regulations makes clear that judicial review does not preclude the Department of Environmental Services, City and County of Honolulu ("ENV") from seeking other relief available to it by law. In this case, ENV has submitted its Application to Modify Special Use Permit No. 2008/SUP-2 to the Honolulu Planning Commission. Since it is the Planning Commission who has original jurisdiction over special use permit applications, ENV's application is allowed by law. KOCA's arguments in this respect have no merit and cannot form the basis for dismissal.

SCHN 3

As noted by KOCA, the Land Use Commission ("LUC") imposed Condition No. 14 to SUP No. 2008/SUP-2. The LUC's decision to impose Condition No. 14 is currently being appealed. Since the LUC's decision is being appealed, the LUC no longer has jurisdiction to modify it. Any request to modify the conditions of SUP No. 2008/SUP-2 must, therefore, start from scratch and be treated as a new application. Because it is a new application, it is properly before the Planning Commission.

If the Planning Commission does not exercise jurisdiction over this case, it would effectively deprive Schnitzer, who was not a party to the earlier proceedings relating to SUP No. 2008/SUP-2, of a forum for which to protect its interests in this case. Such deprivation would be a violation of Schnitzer's due process rights. This contested case must, therefore, proceed.

II. FACTUAL BACKGROUND

A. 2008 APPLICATION

On December 3, 2008, ENV filed an application for a new SUP to supersede the existing SUP for the Waimanalo Gulch Sanitary Landfill ("WGSL"), SUP File No. 86/SUP-5. *See* Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009, attached to and marked as Exhibit 1 to KOCA's Motion ("Planning Commission Decision"), at ¶ 5, pg. 2. The application sought to expand the operating portion of the WGSL by 92.5 acres. *Id.* ENV concurrently sought to withdraw its existing SUP for approximately 107.5 acres (SUP File No. 86/SUP-5) and the conditions imposed therein, if the new SUP was granted. *Id.* at ¶ 6, pg. 3. ENV's application, designated as SUP File No. 2008/SUP-2, was processed by the Department of Planning and Permitting ("DPP"), which recommended to the Planning Commission that the application be approved. *Id.* at ¶ 10, pg. 3.

The Planning Commission conducted a contested case hearing on this application. *See id.*, ¶¶ 19, 20, 22, 23, 25, pgs. 5-6. The opponents in that contested case hearing were Ko Olina

Community Association, Maile Shimabukuro and Colleen Hanabusa. Schnitzer was not a party to those contested case proceedings.

On July 31, 2009, after conducting the contested case, the Planning Commission recommended approval of the new SUP subject to 10 conditions. The Planning Commission further recommended that the prior SUP, File No. 86/SUP-5, be withdrawn once the new SUP took effect. The Planning Commission did not condition its approval of the new SUP on a deadline for accepting municipal solid waste at the WGSL.

On October 22, 2009, the LUC approved the application for a new SUP with conditions. Among the conditions imposed by the LUC when it approved the SUP was Condition No. 14, which required:

> Municipal solid waste shall be allowed at the WGSL up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSL after July 31, 2012.

See Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009, attached to and marked as Exhibit 2 to KOCA's Motion ("LUC Decision"), at pg. 8.

ENV thereafter filed an appeal against the LUC, Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa in the Circuit Court of the First Circuit. Among the issues appealed was the LUC's imposition of Condition No. 14. On September 21, 2010, the Circuit Court affirmed Condition No. 14 of the LUC Decision.

ENV appealed the Circuit Court's decision to the Hawaii Intermediate Court of Appeals. That appeal was subsequently transferred to the Hawaii Supreme Court. That appeal is still ongoing.

Because Schnitzer was not a party to the contested case, it was also not a party to the appeal in the Circuit Court.

B. DESCRIPTION OF THE PENDING APPLICATION

ENV filed the pending application with DPP on June 28, 2011. ENV seeks an Order modifying SUP File No. 2008/SUP-2 by deleting the July 31, 2012 deadline. The basis for the application is as follows:

> This Application is made in accordance with Section 2-18 and Section 2-49 of the Rules of the Planning Commission and Section 15-5-70 of the State of Hawaii, Land Use Commission ("LUC") Rules. Further, the LUC has formally asserted to the Circuit Court of the First Circuit that there is nothing precluding the Department of Environmental Services from requesting relief from conditions of the 2009 LUC Order in the future: "there is nothing to preclude ENV from requesting [from the Planning Commission] an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site." See Exhibit "A," Appellee State of Hawai'i, Land Use Commission's Answering Brief, filed on April 12, 2010, In the Matter of Department of Environmental Services, City and County of Honolulu v. Land Use Commission, et al., Civil No. 09-1-2719-11, p. 9, ...
>
> Also, presenting this Application first to the Planning Commission for its consideration, rather than directly to the LUC, will promote the maximum opportunity for public participation and input by all interested parties. Furthermore, in light of the lack of specificity in the applicable rules, enabling both the Planning Commission and the LUC to consider Applicant's request will reduce the possibility of a procedural challenge. Finally, if the Planning Commission determines that it does not have the authority to consider this request, it may so conclude and direct Applicant to seek consideration from the LUC.

See ENV's Application, at pgs. 1-2.

On September 9, 2011, DPP recommended approval of the present application. In recommending approval of the application, DPP reasoned:

> Section 2-49 of the Planning Commission Rules states that a modification or deletion of a condition shall be processed in the

> same manner as the original petition for an SUP. Section 205-6, HRS, allows the county planning commission to permit certain unusual and reasonable uses within the agricultural district other than those for which the district is classified.
>
> In determining whether a proposed use is deemed "unusual and reasonable," Section 2-45 of the Planning Commission Rules established five guidelines (five tests) to be applied. These guidelines are also found in Title 15-15, Hawaii Administrative Rules for the LUC.
>
> The basic analysis and subsequent conclusion of whether the existing landfill meets the five tests and constitutes an "unusual and reasonable use" was completed and determined by the City and County of Honolulu Planning Commission and by the LUC as the SUP, File No. 2008/SUP -2 (LUC Docket No. SP09-403) was granted on October 22, 2009. The Applicant's instant request does not affect the Director's prior analyses and conclusions in recommending approval of the establishment and expansion of the WGSL.

DPP's Findings of Fact, Conclusions of Law, and Decision and Decision and Recommendation dated September 9, 2011, at pg. 7.

On September 16, 2011, Schnitzer filed a Petition to Intervene in the proceedings relating to the present application. In its Petition to Intervene, Schnitzer asserted that its recycling operations were permitted by the Department of Health, State of Hawaii ("DOH") through a Solid Waste Management Permit ("SWMP"). *See* Memo. in Support of Schnitzer's Petition to Intervene filed September 16, 2011, at pg. 2. One of the conditions of the SWMP required that Schnitzer's recycling residue must be deposited in a DOH-permitted solid waste disposal facility. *Id.* Since WGSL is the only DOH-permitted solid waste disposal facility on Oahu that can accept Schnitzer's recycling residue, enforcement of Condition No. 14 would prevent Schnitzer from being able to dispose of its recycling residue anywhere on Oahu. *Id.* Schnitzer, therefore, claimed that it had business interests that needed to be protected through the contested case process. *Id.*, at pg. 4.

Also, on September 16, 2011, Ko Olina Community Association and Maile Shimabukuro filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties or in the alternative Motion to Intervene with DPP. The basis for Ko Olina Community Association's claims was that they were resort and residential owners of property located across from WGSL. *See* Memo. in Support of KOCA's Petition to Intervene filed September 16, at pg. 9 -10. The bases for Maile Shimabukuro's claims were that she was the duly elected Senator of the 21st Honolulu District located on the Wai'anae Coast and that she was a taxpayer. *Id.*, at pg. 10. These interests are considerably different than those asserted by Schnitzer.

On October 5, 2011, the Planning Commission granted Schnitzer's Petition to Intervene. The Planning Commission also denied the Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties, but granted the Motion to Intervene as joint intervenors.

The matter has now converted to a contested case proceeding pursuant to the Rules of the Planning Commission ("RPC") § 2-56(c).

III. NOTHING IN THE STATE STATUTES AND RULES PREVENTS A NEW APPLICATION FROM BEING FILED WITH THE PLANNING COMMISSION WHILE A PRIOR DECISION IS BEING APPEALED

A. THE HAWAII ADMINISTRATIVE PROCEDURES ACT SPECIFIES THAT JUDICIAL APPEAL IS NOT THE EXCLUSIVE RELIEF

KOCA claims that an agency decision that is under judicial review may only be modified with an authorizing state statute. According to KOCA, the authorizing statute under Hawaii law is HRS § 91-14(e). That provision provides:

> If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the

> agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

It is KOCA's contention that this is the only statutory provision allowing an agency to modify a decision that is pending judicial appeal.

By reading the Hawaii Administrative Procedures Act in this manner, KOCA has rendered the remainder of the statute superfluous. HRS § 91-14(a) states:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but *nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo*, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(Emphasis added). This provision specifically allows an appellant from a contested case proceeding to seek redress through other means, as provided by law. *See e.g., Bush v. Hawaiian Homes Com'n*, 76 Hawai'i 128, 137, 870 P.2d 1272, 1281 (1994) ("Essentially, Appellants are not barred from contesting the Commission's actions through alternative means."); *Hoh Corp. v. Motor Vehicle Indus. Licensing Bd.*, 69 Haw. 135, 143, 736 P.2d 1271, 1276 (1987) (finding that since nothing prevents resort to other means of review, redress or relief provided by law, an appellant may also challenge the constitutionality of the statute supporting the agency action at the same time it challenges the agency action).

In this case, although an appeal is currently pending in the Supreme Court, ENV has proceeded to file a new application to modify SUP File No. 2008/SUP-2 with the Planning

Commission. HRS § 205-6, as explained in more detail below, provides a legal basis for this application. The Hawaii Administrative Procedures Act, therefore, does not prevent ENV's pending application from being considered by the Planning Commission. Any other interpretation would, as noted by KOCA itself, improperly nullify HRS § 91-14(a). *See County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 363, 198 P.3d 615, 626 (2008) ("[A] statute must be interpreted to avoid rendering any part of it a nullity").

B. THE PLANNING COMMISSION HAS PRIMARY JURISDICTION OVER NEW APPLICATIONS FOR A SPECIAL USE PERMIT

Section 205-6, HRS, provides that the county planning commission has primary jurisdiction over special use permit applications:

> (a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning, and the department of agriculture for their review and comment.

Once a special use permit application has been approved by the county planning commission, it can undergo a secondary review process by the LUC in certain circumstances:

> Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.

HRS § 205-6(d). Nowhere in HRS chapter 205 is there a prohibition against filing a new application while an appeal on a prior application is pending.

In this case, it was the LUC who imposed Condition No. 14 to SUP File No. 2008/SUP-2. For this reason, KOCA claims that if this contested case is not dismissed, ENV must file a motion for reconsideration before the LUC pursuant to HAR § 15-15-94(a). However, as KOCA itself pointed out, the commencement of a judicial appeal has divested the LUC of jurisdiction to revisit its prior decision. *See e.g., Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 355 P.2d 83, 86 (Colo. 1960) (stating that "an administrative agency is without authority to change, alter or vacate an order while review proceedings are pending in the [reviewing] court"). Because the LUC no longer has jurisdiction to revisit its decision, any application relating to SUP File No. 2008/SUP-2 essentially starts from scratch and is treated as a new application.

The Rules of the Planning Commission, likewise, recognize that the Planning Commission can treat an application for modification as a new application. RPC § 2-49 provides, in relevant part:

> (a) A petitioner who desires a modification or deletion of a condition imposed by the commission shall make such a request to the commission in writing. This request shall be processed in the same manner as the original petition for a SUP. A public hearing on the request shall be held prior to any commission action.
>
> ...
>
> (c) ... Modification of conditions for areas greater than (15) acres will require the concurrence of the land use commission.

The new application is properly before the Planning Commission since it has primary jurisdiction over such special use permit applications. *See* HRS § 205-6(a). This jurisdiction has not been affected by the pending judicial review, as the Court has not ordered a stay of actions

relating to SUP File No. 2008/SUP-2. *See* HRS § 91-14 ("The proceedings for review shall not stay enforcement of the agency decisions"). The Planning Commission must, after all, continue to render its statutory duties. In this case, SUP File No. 2008/SUP-2 is still in effect. Unless SUP File No. 2008/SUP-2 is no longer in effect, the Planning Commission will continue to have primary jurisdiction over that permit and all conditions contained therein.

Although KOCA refers to a number of cases to support its claim that the Planning Commission is without authority to review the present application, those cases are distinguishable because they relate to attempts by an agency to reopen a matter on appeal. In *Baltimore Ravens, Inc. v. Self-Insuring Employees Evaluation Board*, 74 N.E.2d 449 (2002), the administrative agency in that case held a new hearing and issued a second order to correct the defect in its earlier order that was under appeal. In *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 355 P.2d 83 (1960), the administrative agency in that case attempted to supplement its prior order by entering new findings and new orders while its prior order was under appeal. In *Gagne v. Inhabitants of the City of Lewiston*, 281 A.2d 579 (1971), the administrative agency in that case convened for a second vote in the same case to correct errors in its first vote that was subject to appeal review. In *American Smelting and Refining Co. v. Arizona Air Pollution Control Bd.*, 550 P.2d 612 (1976), the administrative agency in that case acted sua sponte to vacate part of its original order during the pedency of the appeal. In *Doctor's Nursing & Rehabilitation Ctr. v. Sebelius*, 613 F.3d 672 (2009), the administrative agency in that case decided to reopen its administrative proceedings and reconsider the applicant's claims while its original decision was under appeal. None of these circumstances apply here. ENV has not asked the LUC to reopen its prior decision.

KOCA also points to the prior LUC proceedings to argue that ENV itself has recognized the LUC's jurisdiction to consider a request for extending a deadline. KOCA's claim in this respect is disingenuous. At the prior proceedings, the LUC decision had not yet been appealed. Therefore, *at that time*, it was proper for the LUC to reconsider its own deadline. Those circumstances no longer apply here because the LUC's decision has been appealed.

Finally, contrary to KOCA's claims, ENV's application has in fact maximized public participation. This is clearly the case for Schnitzer and others in its class, as their interests were not represented in the earlier contested case proceedings.

IV. DISMISSAL OF THE PENDING APPLICATION WOULD PREJUDICE THE RIGHTS OF SCHNITZER, WHO WAS NOT A PARTY TO THE EARLIER CONTESTED CASE

A significant difference between this contested case and the earlier contested case is that a new party, Schnitzer, has been recognized as an intervenor. RPC § 2-55(c) provides the standard for intervention in a Planning Commission proceeding:

> (c) Leave to intervene shall be freely granted, provided that the commission may deny petition to intervene when in the commission's discretion, it appears that:
>
> (1) The position of the party requesting intervention concerning the proposed action is substantially the same as the position of a party already admitted to the proceeding; and
>
> (2) The admission of additional parties will render the proceedings inefficient and unmanageable.

The term "party" is further defined under RPC § 1-5:

> (j) "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding. More specifically, it includes the following, upon the filing of timely requests:
>
> (1) Any state or county agency;

> (2) *Any person who has some property interest in the land*, or who lawfully resides in the land, *or who can demonstrate that person will be directly and immediately affected by the Commission's decision* that that person's interest in the proceeding is clearly distinguishable from that of the general public; provided that this requirement shall be liberally construed.

(Emphasis added).

Schnitzer has demonstrated that it has a legally cognizable interest in these proceedings. *See* Schnitzer's Petition to Intervene, filed September 16, 2011. In approving Schnitzer's petition to intervene, the Planning Commission necessarily agreed that Schnitzer has an interest in these proceedings.

If the Planning Commission were to dismiss these proceedings, as requested by KOCA, the only available forum for the parties would be the pending lawsuit. However, since Schnitzer was not a party to that lawsuit, this forum would not be available to Schnitzer. *See e.g., Public Access Shoreline Hawaii v. Hawaii County Planning Com'n*, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (2010) (holding that HRS § 91-14 requires that a party seeking judicial review "must have followed the applicable agency rules and, therefore, have been involved 'in' the contested case"). Dismissal of these proceedings would, therefore, deprive Schnitzer of a forum for which to protect its interests. To do so would be a violation of Schnitzer's due process rights. *See e.g.,* HRS §91-9(a) ("[I]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice"); *see also, Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994) ("Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled."). Schnitzer must be afforded an opportunity to be heard in this contested case. This contested case must, therefore, proceed.

V. CONCLUSION

For all the reasons set forth above, Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Dismiss should be denied.

DATED: Honolulu, Hawaii, November 14, 2011.

IAN L. SANDISON
DEAN H. ROBB
TIM LUI-KWAN

Attorneys for Petitioner
SCHNITZER STEEL HAWAII CORP.

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU To Modify SUP No. 2008/SUP-2 by Modifying the State Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, Dated October 22, 2009	FILE NO. 2008/SUP-2 LUC DOCKET NO. SP09-403 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the parties identified below by hand delivery on the date set forth below:

DEPARTMENT OF PLANNING AND PERMITTING
City and County of Honolulu
650 South King Steet, 7th Floor
Honolulu, Hawaii 96813

ROBERT C. GODBEY
Corporation Counsel
DANA VIOLA
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawaii 96813

Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

CALVERT G. CHIPCHASE
CHRISTOPER T. GOODIN
Cades Schutte LLP
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

Attorney for Intervenors
KO OLINA COMMUNITY ASSOCIATION and
MAILE SHIMABUKURO

DATED: Honolulu, Hawaii, November 14, 2011.

IAN L. SANDISON
DEAN H. ROBB
TIM LUI-KWAN
Attorneys for Petitioner
SCHNITZER STEEL HAWAII CORP.